settlement, given the infrequent use of that process in other settlements, it cannot be said the issue is an important one of federal law that this Court ought to consider. Indeed, and for understandable reasons, nowhere do Petitioners contend otherwise.

Nor is the decision of the Court of Appeals for the Sixth Circuit in conflict with another Circuit on the same issue. Petitioners urge, Petition for Writ of Certiorari at 5, that the decision below is in conflict with *Turner v. Orr,* 722 F.2d 661 (11th Cir. 1984). That position, however, misreads *Turner,* the decision of the Court below, and the administration scheme in the present class action settlement.

First, unlike in the *Sulzer* settlement, *Turner* involved a Special Master referral made by the District Court. *Turner,* 722 F.2d at 663 ("Because no agreement was reached, the district court entered an order appointing a special master.") Therefore, the holding in *Turner,* that that special master referral was one contemplated by F.R.C.P. 53, is unremarkable. By contrast, the Settlement Agreement in this class action settlement explicitly contemplated appointment of a special master *by the parties*: "In the event of such an appeal [of a Final Determination issued by the Claims Administrator], *Class Counsel together with the Special State Counsel Committee shall appoint* a special master (subject to the approval of the Court) to make a determination with respect to such Final Determination." Settlement Agreement § 4.6(f)(emphasis added).

The distinction is not merely semantic. F.R.C.P. 53 may well require that special master referrals, made by a District Court, be reviewed to one extent or another by the District Court. But referral of the matter *by the Court* is the triggering

mechanism for District Court review. F.R.C.P. 53. Otherwise, as in this case, a special master appointed by the parties is merely an extra-judicial means for expeditious, alternative, dispute resolution, which is precisely the conclusion of the District Court and the Circuit Court of Appeals, below. (App. 1e, Supplemental App. 30).

Second, unlike in *Turner,* the Settlement Agreement in the *Sulzer* Settlement made abundantly clear that the administration process contemplated by Section 4.6 was intended by the parties to be exhaustive. As noted above, the Settlement Agreement made detailed and rigorous administration requirements culminating, explicitly, in a "final and binding" decision. The reviewing courts in *Turner* made no factual or legal findings regarding the special master in that case, analogous to the findings, with respect to the party-appointed special master, made explicitly by the District Court in this case. (Supplemental App. 20, *et seq.*) (District Court's comprehensive discussion of how the claims administration process came to be negotiated and why Settlement deadlines and processing steps were integral to the bargain the parties struck). A contrary result, that the parties made provisions for expensive, detailed, exhaustive, claims administration, but elected to leave open-ended the requirement of full blown review on appeal to the District Court, would be absurd. Moreover, it would be plainly inconsistent with the intended mechanism here for streamlined, expeditious review of many thousands of claims. *Id.*

Petitioners wisely do not argue that the result in this case is "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." Such an argument would be without merit. The District Court in this case applied the plain terms

of the Settlement Agreement, in accordance with its retained jurisdiction to supervise implementation of the Settlement Agreement, which interpretation the Circuit Court of Appeals readily agreed was correct. (App. 1e). To the contrary: had the District Court or Court of Appeals grafted onto the Settlement Agreement the additional layers of claims administration that Petitioners now seek, doing so would have run afoul of the requirements that those Courts give effect to their previous, unappealed final orders, and that courts reviewing class action settlements abstain from approving and disapproving them in part. *Evans v. Jeff D.*, 475 U.S. 717, 727 (1986).[2]

For the foregoing reasons, Petitioners have failed to carry their burden to identify appropriate bases upon which this Court might appropriately exercise its discretion to award a writ of certiorari. Several additional points bear mentioning why this Court ought to quickly deny this petition.

The administration requirements for this class action depend upon finality of benefit decisions after the party-appointed special master renders a benefit decision. That certainty permits the efficient operating of the claims

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2. Petitioners unfairly slight the opinion of the Court of Appeals below by asserting that that Court cited to only one case as its legal authority for affirming the District Court. Petition for Certiorari at 7. The Court below adopted the reasoning and ruling of the District Court, (App. 1e), which rendered its decision in a lengthy, well-reasoned, and densely supported opinion (Supplemental App. 7-37). Petitioners have received deliberate consideration throughout the claims administration process, to which they agreed to be bound, and now have received that same consideration, in excess of that for which they bargained, in the District Court and the Court of Appeals for the Sixth Circuit.

administration process. If the Claims Administrator were required to await possible trial of claims issues in the District Court, the uncertainty of those decisions, and their possible implications for other claimants, would paralyze claims administration. While Petitioners state the only matters that might be relitigated in the District Court, after party-appointed special master review, are "legal questions," they point to nothing in the Settlement Agreement that would purport to require such a limitation. Even if there were such a limitation, the pendency of perhaps thousands of legal rulings in the District Court would cripple the claims administration process. Indeed, the pendency of the current appellate litigation, and its accompanying uncertainty for claims administration processes, has caused the delay in full payment of Settlement benefits to more than a thousand Class Members eligible for benefits from the Extraordinary Injury Fund.

Finally, as has been noted elsewhere in the course of this appeal, *see* Amicus Brief in the Court of Appeals for the Sixth Circuit of Weitz & Luxenberg law firm, the Settlement Class in this case is elderly. Delay in paying out benefits runs the risk that benefit awards made a year or more ago, will not be payable until after an eligible Class Member has died. So that Class Members may enjoy the full benefits of the Settlement Agreement quickly and meaningfully, the Claims Administrator urges speedy denial of the present petition.

CONCLUSION

For these reasons, Respondent Claims Administrator James McMonagle urges that Petitioners' Kane Petition for a Writ of Certiorari be denied. No important federal question is raised by Petitioners. The decision of the Court below is not in conflict with a decision of another Circuit Court on the same issue. No abuse of discretion occurred, or is alleged, such that this Court should invoke its supervisory powers in this matter.

Respectfully submitted,

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as Claims Administrator

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No. _____

In the

Supreme Court of the United States

CeCee C. Kane and Joseph P. Kane,
Petitioners,

v.

Sulzer Settlement Trust,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI SUPPLEMENTAL APPENDIX DISTRICT COURT OPINIONS

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APPENDIX INDEX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER
HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
JUDGMENT AND ORDER
DATE OF ENTRY: June 4, 2002

On May 8, 2002, the Court entered an Order certifying the Plaintiff Class and granting final approval to the Settlement Agreement.[1] See docket no. 340 ("Final Approval Order"). The Final Approval Order stated that the opt-out deadline would be May 15, 2002. The Final Approval Order also stated that the Injunction Order shall automatically expire on 5:00

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[1] In the Final Approval Order, the Court specifically concluded that: (1) the class (and subclasses) identified in the Fifth Amended and Consolidated Class Action Complaint, and also in the Settlement Agreement, satisfies the requirements of Fed. R. Civ. P. 23(a), as well as Fed. R. Civ. P. 23(b)(2) and (b)(3); (2) the Notice that was sent to the Class was the best practicable under the circumstances, and satisfies the requirements of Fed. R. Civ. P. 23(c)(2) & (e); (3) the proposed settlement was reached after extensive arms-length negotiations and is premised upon substantial inquiry into and discovery relating to all legal and factual issues relevant to the propriety of the proposed Settlement Agreement; and (4) the proposed Settlement Agreement is fair, adequate, and reasonable, and meets the requirements of Fed. R. Civ. P. 23(3). Order at 3. The Court specifically incorporates those conclusions and the rest of the Final Approval Order here, by reference.

p.m, EST, June 7, 2002.

The Settlement Agreement, as modified,[2] provided that the Sulzer defendants retained the right to terminate and withdraw from the Agreement at any time prior to May 31, 2002.. Agreement at §10.1. The Sulzer defendants chose not to withdraw from the Agreement, filing a "notice of appearance" on May 31, 2002 (docket no. 352.)

Accordingly, pursuant to Section 13.3 of the Settlement Agreement, the Court hereby **ORDERS** as follows:

- the Court's prior certification of the Settlement Class, under Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3), for Settlement purposes only, is hereby **CONFIRMED**.
- the Court's prior appointment of the Class Representatives identified in the Settlement Agreement at 3, §1.1(t), as the representatives of the Settlement Class, is hereby **CONFIRMED**.
- the Court's prior conclusion that the proposed Settlement Agreement is fair, adequate, non-collusive, and reasonable, and meets the requirements of Fed. R. Civ. P. 23(e), is hereby **CONFIRMED**.
- all claims and actions asserting Settled Claims[3] against Sulzer or Sulzer AG pending before the Court (other than claims and actions of a Class Member who exercises an Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement), are hereby **DISMISSED WITH PREJUDICE**., and without costs; however, in the event that Final Judicial Approval is not obtained, these claims and/or actions may be reinstalled to their status quo position at the

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[2] The termination provision of the Settlement Agreement, which appears at docket no. 237, was modified by docket no. 348.

[3] The term "Settled Claims" is defined in the Settlement Agreement at 9, §1.1(zzz). Other terms used in this Order may also be found in the definitions section of the Settlement Agreement.

time of dismissal, both procedurally and substantively.

- all Class Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement) entitled to benefits under the Settlement Agreement are hereby **PERMANENTLY ENJOINED** from asserting and/or continuing to prosecute against Sulzer, Sulzer AG or any other Released Party any and all Settled Claims which the Class Member (other than a Class Member who exercises and Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement) had, has, or may have in the future in any federal or State court;
- the Court **RESERVES** continuing and exclusive jurisdiction over the Parties, including Sulzer, Sulzer AG, and the Class Members (other than a Class Member who exercises an Opt-Out Right pursuant to Section 3.8 of the Settlement Agreement), to administer , supervise, interpret, and enforce the Settlement Agreement in accordance with its terms, and to supervise the operation of the Sulzer Settlement Trust.

This judgment is entered pursuant to Fed. R. Civ. P. 58, and is a final appealable Order.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD 'MALLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER
HIP PROSTHESIS
AND KNEE PROSTHESIS
LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
MEMORANDUM AND ORDER
DATE OF ENTRY: September 18, 2003

A number of plaintiffs have filed documents purporting to "appeal" determinations made by the Special Master regarding their entitlement to benefits. See nos. 936 ("appeal" by plaintiff Freund), 963 ("appeal" by plaintiff Lee), 981 ("appeal" by plaintiff Vasquez), 994 ("appeal" by plaintiff Carpenter), 970 (motion to amend by plaintiff Carpenter)[1], 1017 ("appeal" by plaintiff Van Deventer), and 1059 ("appeal" by plaintiff Sak).[2] These motions and appeals must all be

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[1] Plaintiff Carpenter attacked the Special Master's benefit determination in two ways – she filed an "appeal" at docket no. 994, and also a motion to amend at docket no. 970. With the latter motion, Carpenter seeks to amend Claims Administrator Procedure no. 29 ("CAP 29"), arguing that the application of CAP 29 by the Claims Administrator and the special Mater unfairly deprived her of benefits, so the Court should amend the CAP. The essence of this motion to amend remains, however, a request that this Court review the Special Master's final determination.

[2] See also docket no. 1093, which is a similar appeal by plaintiff Mediate to the Sixth Circuit. The Court **DIRECTS THE CLERK OF COURTS** to forward a copy of this Order to the Sixth Circuit Court of Appeals in connection with Mediate's appeal.

OVERRUED .

The Settlement Agreement between the parties in this case provides that (1) a settling plaintiff may apply for settlement benefits by submitting the required forms to the Claims Administrator, (2) the Claims Administrator will then make a determination regarding the plaintiff's entitlement to benefits; (3) if the plaintiff disagrees with the Claims Administrator's determination, he may file an appeal with court-appointed Special Master; and (4) "[a]ny determination by the special master ... shall constitute a final and binding determination." Settlement Agreement at §4.6(g).

The Settlement Agreement is a binding contract between the parties. If a given plaintiff elected not to opt out of the class-action Settlement Agreement, and to file a claim for benefits, then that plaintiff also agreed to be bound by all of the provisions of that Settlement Agreement, including the one quoted above. As such, a determination by the special master regarding whether, or to what extent, a given plaintiff is entitled to benefits under the Settlement Agreement is "a final and binding determination." The Settlement Agreement does NOT provide for an additional appeal of the special master's determination to this Court. Nor do it provide an additional appeal of the special master's determination to the Sixth Circuit Court of Appeals.

To the extent a settling plaintiff had any right of appeal from the terms and application of the Settlement Agreement, it was only a right to appeal the Court's June 4, 2002 Order, which gave official approval to all of the terms and conditions contained in the parties' Settlement Agreement and dismissed the plaintiffs' settled claims with prejudice. See docket no. 353. The Court's June 4, 2002 Judgment Order, however, was never appealed by any party.

Accordingly, the Court hereby **DECLARES** that any and all documents filed with this Court by any plaintiff purportedly seeking and "appeal" to this Court, or otherwise seeking review by this Court, of a benefits determination by the

special master are a nullity and are **VOID.** This holds true whether the putative "appeal" was previously filed or is hereafter filed, and the Court will not address them further.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD 'MALLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01-CV-9000

IN RE: SULZER HIP PROSTHESIS AND KNEE PROSTHESIS LIABILITY LITIGATION

(MDL Docket No. 1401)
JUDGE O'MALLEY
MEMORANDUM AND ORDER
DATE OF ENTRY: February 6, 2004

Class-member CeCee Kane moves this Court to enforce the terms of the class-action settlement agreement in this case (docket no. 1179). For the reasons stated below, this motion is **DENIED.**[1] Kane's motion for an Order addressing the prior motion (docket no. 1578) is **DENIED** as moot.

I. Background

The Court has recited the long and complicated factual and procedural background of this case in earlier opinions, and does not repeat all of it here. See, e.g., In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation, 268 F. Supp. 2d 907, 910-21 (N.D. Ohio 2003) (docket no. 738 at 3-22). Below, however, the Court sets out an abbreviated history of this case, highlighting certain aspects to give context to this Order.

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[1] Technically, the Court is granting Kane's motion, as the Court is enforcing the terms of the Class Action Settlement Agreement, as written. The Court's denial of Kane's motion is premised on its conclusion that, to interpret the Settlement Agreement in the way Kane argues it should be interpreted, would be not to enforce the Agreement as written.

A. Litigation Leading Up To Settlement

Sulzer Orthopedics, Inc. ("Sulzer Orthopedics") is a designer, manufacturer, and distributor of orthopedic implants for hips, knees, shoulders, and elbows.[2] One of the products manufactured by Sulzer Orthopedics is known as the "Inter-Op acetabular shell," which is one component of a system used for complete hip replacements. Another product manufactured by Sulzer Orthopedics is the "Natural Knee II tibial baseplate," which is one component of a system used for a total knee replacement. While some orthopedic implants are cemented or screwed into position, others are designed to allow the bone to grow into and around them, holding them securely in place. The Sulzer Inter-Op and Natural Knee II products were bother designed to bond with the natural bone.

About three years ago, Sulzer Orthopedics began to suspect that a manufacturing defect [3]was preventing some of its Inter-Op shells from bonding properly with the acetabulum bone. In early December of 2000, Sulzer Orthopedics announced a voluntary recall of approximately 40,000 units of its Inter-Op shell, of which about 26,000 had already bee

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[2] During the relevant time-frame, Sulzer Orthopedics was wholly owned by Sulzer Medica USA Holding Company ("Sulzer Medica USA"), and Sulzer Medica USA was wholly owned by Sulzer Medica Ltd. ("Sulzer Medica"), a Swiss company. Sulzer AG, another Swiss company, owned 74% of Sulzer Medica. On July 10, 2001, during the course of this litigation, Sulzer AG divested itself of all but about 5% of its shares in Sulzer Medica. On June 1, 2002, Sulzer Medica, Sulzer Orthopedics, and several related entities changed the "Sulzer" and "Sulzer Medica" portions of their names to "Centerpulse." The names changed again, after the Swiss firm Zimmer Holdings, Inc. acquired Centerpulse on October 2, 2003. For the sake of consistency with Court's prior Orders, this Order uses the old "Sulzer" monikers.

[3] The Court recognizes that the defect was merely alleged and never proved at trial. For ease of reference, however, and in light of Sulzer Orthopedics' voluntary recall and certain apparent concessions made, the Court occasionally refers in this memorandum to the medical devices as "defective," rather than "allegedly defective."

implanted in patients. Sulzer Orthopedics then "reprocessed" some of the recalled units – that is, "re-cleaned" about 16,500 of the never-implanted, recalled shells – and then resold them. About 6,100 of these reprocessed units were implanted.

After Sulzer discovered the problem with the Inter-Op shells, the company reviewed its manufacturing processes for its other medical implant products. This review led Sulzer Orthopedics to discover that it had used a similar manufacturing process during fabrication of its Natural Knee II tibial baseplate. Just as it did with the Inter-Op shell hip implants, Sulzer Orthopedics voluntarily notified the public that a problem existed with certain Natural Knee tibial baseplates. Sulzer Orthopedics also asked its distributors and sales agents to return any Natural Knee baseplates manufactured from July 2000 to December 2000 that had not already been implanted. Sulzer did not "reprocess" any Natural Knee baseplates. The suspected manufacturing defect occurred during production of about 1,600 Natural Knee baseplates, about 1,300 of which were implanted in patients.

As of today, over 3,500 of the patients who received implants of the defective Inter-Op shells have undergone "revision surgery" – removal of the defective implant and replacement with a new one. In addition, about another 170 patients who received "reprocessed" Inter-Op shells have undergone revision surgery. Further, over 600 revision surgeries for the Natural Knee baseplate implants have occurred. Sulzer Orthopedics now estimates that virtually all of those medically eligible patients who will need revision surgery to replace these defective medical devices have already undergone it. The majority of these patients were elderly.

Shortly after Sulzer Orthopedics issued its voluntary recall of its Inter-Op shells in December of 2000, a number of plaintiffs around the country filed lawsuits, in both state and federal courts. By August 31, 2001, there were pending about 1,300 civil suits nationwide, about 200 of which were in federal court. These cases involved about 2,000 named plaintiffs, primarily including implant recipients and their

spouses. About 19 of the state court cases were styled as class actions, as were about 34 of the federal court cases. The defendants named in these lawsuits included not only Sulzer Orthopedics, but also: (1) Sulzer Medica USA; (2) Sulzer Medica; (3) Sulzer AG; (4) various other Sulzer-related entities; and (5) various surgeons, hospitals, and medical supply companies connected to the distribution or implantation of the defective product. The causes of action in these lawsuits included claims for defective design, marketing, and manufacture; breach of express and implied warranties; negligence; strick liability; and other legal theories of recovery. On August 30, 2001, the first of these cases to go to trial ended with a substantial plaintiffs' verdict.

In early 2001, pursuant to 28 U.S.C. §1407, three different federal plaintiffs with Inter-Op shell hip implants filed motions with the Federal Judicial Panel on Multi-District Litigation ("MDL Panel"), seeking to consolidate and centralize 30 of the federal lawsuits. MDL docket no. 1401. On June 19, 2001, the MDL Panel granted these motions, consolidating and transferring all related pending federal litigation to the Northern District of Ohio and assigning oversight of the MDL proceedings to the undersigned. Eventually, virtually all of the federal cases involving the Inter-Op shells and Natural Knee baseplates – over 400 in all – were transferred to this Court.

Even before this MDL Panel assigned oversight of this case to this Court, Sulzer Orthopedics had begun to discuss the possibility of a class-action settlement with various attorneys around the country. Thus, fairly early in the course of this litigation – on August 15, 2001 – the parties filed a joint motion for Order conditionally certifying a class, and a joint motion for preliminary approval of a class settlement. On August 29, 2001, the Court granted the motions for conditional certification of an opt-out settlement class and preliminary approval of the proposed settlement agreement.

Although the Court did preliminarily conclude that the proposed settlement was fair and reasonable and adequate, it